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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re:

LEONARDO CARBALLO AND  
ANGELA NUNEZ,

DEBTORS.

Case No.: 10-12105-BAM  
Hon. Bruce A. Markell  
Chapter 11

Hearing Date: May11, 2010  
Hearing Time: 9:00 a.m.

**MOTION TO VALUE COLLATERAL, "CRAM DOWN" AND MODIFY  
RIGHTS OF SECURED CREDITOR PURSUANT TO 11 U.S.C.  
SECTION 506(a) AND SECTION 1322**

COME NOW LEONARDO CARBALLO and ANGELA NUNEZ, (hereinafter the  
"Debtors"), by and through their attorney, Ryan Alexander, of The Law Offices of Ryan Alexander,  
and move this Court to modify the rights of Americas Servicing Co. (the "Mortgage Company") to  
be partially unsecured and modify the rights of said creditor accordingly.

In support of this Motion, the Debtors assert the following:

1. Debtors filed their instant Chapter 11, Case No. 10-12105-BKM on February  
10, 2010.

2. On the petition date, Debtors owned real property at 4132 Knoll Ridge Avenue, N. Las Vegas, NV 89032 used as a rental property and described herein as:

Lot Ninety (90) in Block Five (5) of Montero Unit No. 2B as shown by Map Thereof on File in Book 53 of Plats 69 in the Office of the County Recorder Clark County, Nevada.

3. The value of the Subject Property is \$108,000.00. (See Collateral Market Value Report attached hereto as Exhibit "A").

4. Per Schedule "D" of the petition, said property at the time of filing was subject to the following secured claims evidenced by the Promissory Note and allegedly secured by Deeds of Trust (See Exhibit "B").

<u>Secured Creditor</u>	<u>Approximate Lien Amount</u>
<u>First Mortgage:</u>	\$225,600.00
Americas Servicing Co.	
1 Home Campus	
Des Moines, IA 50328	
<u>Second Mortgage:</u>	
Select Portfolio Servicing	\$ 41,737.00
PO Box 5250	
Salt Lake City, UT 84165	
<u>Total Amount Owed:</u>	<u>\$267,337.00</u>

The Debtors' Property does not have any equity and is worth significantly less than its secured debt. Accordingly, the Debtors request that the Court find that a portion of the lender's claim is unsecured and should be reclassified as a general unsecured claim to receive its pro-rata distribution with other general unsecured creditors through the Debtors' Chapter 11 plan.

#### MEMORANDUM OF LAW

1. Section 506(a)(1) of the Bankruptcy Code provides that a Chapter 11 debtor may bifurcate a secured lender's claim into an allowed secured claim and an allowed unsecured claim based upon the actual value of the property securing such lender's lien.

1 An allowed claim of a creditor secured by a lien on  
2 property in which the estate has an interest, or that is  
3 subject to setoff under Section 553 of this title, is a  
4 secured claim to the extent of the value of such creditor's  
5 interest in the estate's interest in such property, or to the  
6 extent of the amount subject to setoff, as the case may be,  
7 and is an unsecured claim to the extent that the value of  
8 such creditor's interest or the amount so subject to setoff  
9 is less than the amount of such allowed claim. Such  
10 value shall be determined in light of the purpose of the  
11 valuation and of the proposed disposition or use of such  
12 property, and in conjunction with any hearing on such  
13 disposition or use or on a plan affecting such creditor's  
14 interest.

15 11 U.S.C. Section 506(a)(1).

16 2. The Supreme Court has recognized that Section 506 of the Bankruptcy Code defines  
17 the amount of the secured creditor's allowed secured claim and the conditions of his receiving  
18 post-petition interest. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*,  
19 484 U.S. 365, 371 (1988). In *United Sav. Ass'n of Texas*, the Supreme Court interpreting Section  
20 506(a) of the Bankruptcy Code found that:

21 In subsection (a) of this provision the creditor's "interest  
22 in property" obviously means his security interest without  
23 taking account of his right to immediate possession of the  
24 collateral on default. If the latter were included, the  
25 "value of such creditor's interest" would increase, and the  
26 proportions of the claim that are secured and unsecured  
27 would alter, as the stay continues-since the value of the  
28 entitlement to use the collateral from the date of  
bankruptcy would rise with the passage of time. No one  
suggests this was intended. The phrase "value of such  
creditor's interest" in Section 506(a) means "the value of  
the collateral."

29 See id. (emphasis added) (quoting H.R. Rep. No. 95-595, pp. 181, 356 (1977)).

30 3. The Ninth Circuit agrees with this interpretation of Section 506 of the  
Bankruptcy Code. *In re Maldonado* 46 B.R. 497, 499 (9<sup>th</sup> Cir. BAP 1984) (interpreting Section

1 506(a), "a claim 'is a secured claim to the extent of the value of [the] creditor's interests' in the  
2 estate's interest in the property. The entire claim is not a secured claim. The claim is secured  
3 only to the extent of the value of the secured interest.")

4 4. In addition, this Bankruptcy Court has found that "an 'allowed secured claim' is  
5 a determination generally made under 11 U.S.C. Section 506." In re BBT, 11 B.R. 224, 229  
6 (Bankr. D. Nev. 1981). The Bankruptcy court further stated that, with respect to a claim  
7 secured by a lien on property of the estate, "to the extent that the value of the property is less  
8 than the amount of the total allowed claim, **the claim is unsecured.**" Id. (emphasis added).  
9

10 5. Thus, pursuant to the law of this Circuit, the amount of the allowed secured  
11 claim cannot exceed the market value of the property and the remainder of the claim must be  
12 treated as an allowed unsecured claim for purposes of the plan. In re Sagewood Manor  
13 Associates Ltd. Partnership, 22 B.R. 756, 773 (Bankr. D. Nev. 1998) (holding that the court  
14 may confirm a chapter 11 plan over the objection of a class of secured claims if the members of  
15 that class are to receive under the plan property of a value equal to the allowed amount of their  
16 secured claims, as determined under 11 U.S.C. Section 506(a)).  
17

18 6. Moreover, the Ninth Circuit Court of Appeals has also found that a wholly  
19 unsecured lienholder's claim can be modified and reclassified as a general unsecured claim  
20 pursuant to Section 506(a) of the Bankruptcy Code. See In re Zimmer, 313 F.3d 1220 (9<sup>th</sup> Cir.  
21 2002.) Specifically, the Court held:  
22

23  
24 Section 506(a) divides creditors' claims into 'secured  
25 claims' and 'unsecured claims.' Although the  
26 conventional interpretation of 'secured' might include  
27 any claim in which the creditor has a security interest in  
28 the debtor's property, Section 506(a) makes clear that the  
status of a claim depends on the valuation of the property:

1           ‘An allowed claim of a creditor secured by a lien  
2           on property in which the estate has an interest ... is a  
3           secured claim to the extent of the value of such creditor’s  
4           interest in the estate’s interest in such property ... and is  
5           an unsecured claim to the extent that the value of such  
6           creditor’s interest ... is less than the amount of such  
7           allowed claim.’

8           11 U.S.C. 506(a). To put it more simply, a claim  
9           such as a mortgage is not a ‘secured claim’ to the extent  
10          that it exceeds the value of the property that secures it.  
11          Under the Bankruptcy Code, ‘secured claim’ is thus a  
12          term of art; not every claim that is secured by a lien on  
13          property will be considered a ‘secured claim.’ Here, it is  
14          plain that PSB Lending’s claim for the repayment of its  
15          loan is an unsecured claim, because its deed of trust is  
16          junior to the first deed of trust, and the value of the loan  
17          secured by the first deed of trust is greater than the value  
18          of the house.

19          *In re Zimmer*, 313 F. 3d at 1222-23.

20          7.       Accordingly, because the property is an investment, and the mortgage on the  
21          Property is undersecured, the lender’s claim should be bifurcated into a secured claim in the  
22          amount of \$108,000.00 and an unsecured claim of \$117,600.00 based on the market value of  
23          the Property as shown in the appraisal. Importantly, the Debtor does not seek to modify any of  
24          the terms or conditions of the Loan and requests that the Court enter an order stating such  
25          terms as the interest rate and loan amortization remain in effect.

26          8.       Finally, the filing of a motion rather than an adversary proceeding to achieve the  
27          relief requested herein is appropriate in this Court. See *In re Bonsignori*, Case No. BKS-08-  
28          11830-LBR (D. Nev. June 25, 2008) (approving the stripping off of an unsecured lien by  
                motion); see also *In re Robert*, 313 B.R. 545 (Bankr. N.D.N.Y. 2004); *In re Bennett*, 312 B.R.  
                843 (Bankr. W.D. Ky. 2004); *In re King*, 290 B.R. 641 (Bankr. C.D. Ill. 2003); *In re*  
                *Millsbaugh*, 302 B.R. 90 (Bankr. D. Idaho 2003); *Dickey v. Ben. Fin. (In re Dickey)*, 293 B.R.

1 360 (Bankr. M.D. Pa. 2003); In re Hill, 304 B.R. 800 (Bankr. S.D. Ohio 2003); In re Sadala,  
2 294 B.R. 180 (Bankr. M.D. Fla. 2003); In re Fisher, 289 B.R. 544 (Bankr. W.D. N.Y. 2003); In  
3 re Hoskins, 262 B.R. 693 (Bankr. E.D. Mich. 2001); In re Fuller, 255 B.R. 300 (Bankr. W.D.  
4 Mich. 2000); and In re Williams, 166 B.R. 615 (Bankr. E.D. Va. 1994).

### 5 CONCLUSION

6  
7 9. Bankruptcy law is clear, absent sufficient equity in the Property, the mortgage  
8 lender's claim is only partially secured must be bifurcated into secured and unsecured claims.  
9 The wholly unsecured portion should receive only its pro rata distribution with other general  
10 unsecured creditors through the Debtor's Chapter 11 plan.

11  
12 WHEREFORE, Debtor prays that this Court: (i) enter an order finding the value of the  
13 Property to be \$108,000.00; (ii) bifurcate the mortgage claim into secured and unsecured  
14 claims which reflect the current value of \$108,000.00 and the unsecured amount of  
15 \$117,600.00 respectively; (iii) reclassify the wholly unsecured claims to be paid pro rata with  
16 other general unsecured creditors through the Debtor's Chapter 11 plan; and (iv) such other  
17 relief the Court deems just and property.

18  
19 Dated this 6<sup>th</sup> day of April, 2010.

20  
21 Respectfully submitted,  
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